



DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 232

[Docket No. FR- 5537-F-02]
RIN-2502-AJ04

Federal Housing Administration (FHA) Section 232 Healthcare Mortgage Insurance Program: Partial Payment of Claims

AGENCY: Office of the Assistant Secretary for Housing – Federal Housing Commissioner, HUD.

ACTION: Final rule.

SUMMARY: This rule amends the regulations governing FHA's Section 232 Healthcare Mortgage Insurance program (Section 232 program) by establishing the criteria and process by which FHA will accept and pay a partial payment of a claim under the FHA mortgage insurance contract. The Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. Through acceptance and payment of a partial payment of claim, FHA pays the lender a portion of the unpaid principal balance and recasts a portion of the mortgage under terms and conditions determined by FHA, as an alternative to the lender assigning the entire mortgage to HUD. Partial payment of claim also allows FHA-insured healthcare projects to continue operating and providing services.

DATES: Effective Date: **[Insert date that is 30 days after the date of publication in the Federal Register.]**

FOR FURTHER INFORMATION CONTACT: Kelly Haines, Director, Office of Residential Care Facilities, Office of Healthcare Programs, Office of Housing, Department of Housing and

Urban Development, 451 7th Street, SW, Room 6264, Washington, DC 20410-8000; telephone number 202-708-0599 (this is not a toll-free number). Persons with hearing or speech impairments may access this number through TTY by calling the toll-free Federal Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

A. Background

FHA's Section 232 program insures mortgage loans to facilitate the construction, substantial rehabilitation, purchase, and refinancing of nursing homes, intermediate care facilities, board and care homes, and assisted-living facilities. A project may include more than one type of facility and financing, and a combination of these uses is acceptable. The Section 232 program is authorized under the National Housing Act (12 U.S.C. 1715w). HUD's regulations for the Section 232 program are codified in 24 CFR part 232. While many aspects of HUD's healthcare facility operations, including the basic contract and eligibility requirements, are governed by the regulations applicable to HUD's multifamily mortgage insurance programs, separate healthcare regulations have been adopted to address program operations specific to healthcare facilities, such as state licensing requirements.¹

One process well-established and long used in HUD's multifamily housing programs is acceptance of partial payment of claims (PPCs). The regulations implementing the statutory authority to accept PPCs, which FHA adopted in 1985, and which are codified in 24 CFR 207.258b, specifically excluded FHA's Section 232 program from the multifamily PPC process. (See 24 CFR 232.251(a).)

¹ The regulations codified at 24 CFR part 200 (entitled "Introduction to FHA programs") set forth, in a single location of the Code of Federal Regulations, requirements that are generally applicable to FHA programs. The regulations at 24 CFR 232.2 require that facilities meet state licensing requirements.

Congress specifically authorized PPCs for the Section 232 program in 1997. (See 12 U.S.C. 1735 f-19.) However, as the regulatory provisions governing the multifamily programs, which predated the 1997 statutory amendments, were not revised to reflect the statutory authority to use PPCs for healthcare facilities, HUD proposed revisions specifically to address PPCs.

B. The Proposed Rule and Public Comments

On July 9, 2012, HUD published a proposed rule at 77 FR 40301, in which it submitted for public comment a proposed revision to the Section 232 program regulations to provide, in regulation, the procedures and criteria for FHA to determine when PPCs should be considered and paid for healthcare facilities.

The proposed regulations governing PPCs in the Section 232 program used the current multifamily program regulations governing PPCs, codified at 24 CFR 207.258b, as a baseline. Those PPC regulations were modified based on FHA's experience in implementing the PPC process in its multifamily housing programs, and in utilizing PPCs in the Section 232 program on a periodic and temporary basis.

The proposed rule added a new § 232.882, entitled "Partial Payment of Claims," to the Section 232 program regulations in 24 CFR part 232 to provide that if the mortgagee elects to assign a mortgage to the FHA Commissioner, under certain circumstances the Commissioner may request the mortgagee to accept a partial payment of the claim. That proposed PPC regulation for the Section 232 program differed from the regulations establishing the PPC process for the multifamily programs primarily because the focus of the Section 232 program is on healthcare facilities.

As stated in the proposed rule preamble and emphasized here in this preamble to the final rule, FHA's partial payment of claim is made pursuant to the contract of mortgage insurance between FHA and the mortgage lender, which are the only parties to the contract. Borrowers and operators are neither parties to the contract of insurance, nor are they third-party beneficiaries, and thus they do not have any rights or expectations in regard to any decision made by FHA to accept or reject a mortgagee's request for a partial payment of claim.

By establishing a standard process and criteria for acceptance and payment of PPCs in the Section 232 program, partial payment of claims can occur more frequently than they do now in the Section 232 program, not only resulting in savings to the FHA insurance fund, but helping to restore a project to financial stability.

The public comment period for the July 9, 2012, proposed rule closed on September 7, 2012, and HUD received one public comment through the www.regulations.gov website. The commenter, an association of healthcare finance bankers and healthcare consultants, expressed strong support for the proposed PPC change, as it would make the Section 232 program stronger by allowing appropriate use of the partial-payment-of-claim option and provide another tool to help struggling projects. The commenter offered no suggested changes, and urged HUD to implement the final rule as quickly as possible.

C. This Final Rule

In this final rule, HUD adopts the proposed rule without substantive change, but makes an organizational change and makes certain citation revisions as a result of the organizational change. In this final rule, HUD is adding the PPC provisions to subpart B, entitled Contract Rights and Obligations. In the proposed rule, these changes were proposed to be added to

subpart D, which is also titled Contract Rights and Obligations, but subpart D follows subpart C, Supplemental Loans to Finance Purchase and Install Fire Safety Equipment, and focuses on payments and claims related to loans to finance the purchase and installation of fire safety equipment. Relocating the PPC provisions to part 232 subpart B, which addresses contract rights and obligations generally under the Section 232 program, was determined to be a more appropriate fit. Further, HUD has made several minor revisions in the final rule stage to conform the references in this rule to the relevant sections describing the claims process to reflect the change from subpart D.

Findings and Certifications

Executive Order 13563, Regulatory Review

The President's Executive Order (EO) 13563, entitled "Improving Regulation and Regulatory Review," was signed by the President on January 18, 2011, and published on January 21, 2011, at 76 FR 3821. This EO requires executive agencies to analyze regulations that are "outmoded, ineffective, insufficient, or excessively burdensome, and to modify, streamline, expand, or repeal them in accordance with what has been learned." Section 4 of the EO, entitled "Flexible Approaches," provides, in relevant part, that where relevant, feasible, and consistent with regulatory objectives, and to the extent permitted by law, each agency shall identify and consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public. As this rule will include guidance for PPCs in the Code of Federal Regulations, HUD submits that the changes by this rule to the Section 232 regulations are consistent with the EO's directions. The existing Section 232 regulations provide insufficient guidance to the public on PPCs for the Section 232 program. These changes will reduce risk to

the FHA insurance fund by establishing the criteria and process by which FHA will accept and pay a partial payment of the claim under the FHA mortgage insurance contract, as an alternative to the lender assigning the entire mortgage to HUD. It therefore strengthens the Section 232 program, and helps to ensure that healthcare facilities remain financially viable.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 et seq.) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

This rule is directed to strengthening HUD's Section 232 program by establishing a process and criteria by which the FHA may allow partial payment of claims for Section 232 projects. As noted under the discussion of EO 13563, establishment of this process also opens up another means by which healthcare project owners can restore troubled projects to financial stability. Acceptance of PPCs helps healthcare project owners and operators to lower project debt, and continue to provide valued healthcare services to the communities they serve. This established process for acceptance of PPCs will help all healthcare project owners, large and small. Additionally, by clarifying and codifying existing requirements, the rule makes it easier for borrowers and operators to comply with their legal obligations. Accordingly, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities

Information Collection Requirements

The information collection requirements contained in this rule were reviewed by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520), and assigned OMB Control Numbers 2502-0418.

In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

The docket file is available for public inspection.

Environmental Impact

A Finding of No Significant Impact with respect to the environment for this rule was made at the proposed rule stage in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). That Finding of No Significant Impact remains applicable to this final rule and is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street, SW, Room 10276, Washington, DC 20410-0500. Due to security measures at the HUD Headquarters building, please schedule an appointment to review the finding by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Relay Service at 800-877-8339.

Executive Order 13132, Federalism

Executive Order 13132 (entitled "Federalism") prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs

on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This rule will not have federalism implications and would not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and on the private sector. This rule does not impose any federal mandates on any state, local, or tribal governments, or on the private sector, within the meaning of UMRA.

Catalogue of Federal Domestic Assistance

The Catalogue of Federal Domestic Assistance Number for the Mortgage Insurance Nursing Homes, Intermediate Care Facilities, Board and Care Homes, and Assisted Living Facilities program is 14.129.

List of Subjects in 24 CFR Part 232

Fire prevention, Health facilities, Loan programs-health, Loan programs-housing and community development, Mortgage insurance, Nursing homes, Reporting and recordkeeping requirements

Accordingly, for the reasons cited in the preamble, HUD amends part 232 of title 24 of the Code of Federal Regulations as follows:

PART 232 – MORTGAGE INSURANCE FOR NURSING HOMES, INTERMEDIATE CARE FACILITIES, BOARD AND CARE HOMES, AND ASSISTED LIVING FACILITIES

1. The authority citation for 24 CFR part 232 is revised to read as follows:

Authority: 12 U.S.C. 1715b, 1715w, 1735f-19; 42 U.S.C. 3535(d).

2. Add § 232.256 to subpart B to read as follows:

§ 232.256 Partial payment of claims.

(a) When a lender for a loan on a healthcare project becomes eligible to file an insurance claim and to assign the mortgage to the Commissioner pursuant to § 207.258, the Commissioner may request the lender, in lieu of assignment, to accept a partial payment of the claim under the mortgage insurance contract and recast the mortgage, under such terms and conditions as the Commissioner may determine.

(b) The Commissioner may request the lender to participate in a partial payment of claim in lieu of assignment only after a determination that partial payment would be less costly to the Federal Government than other reasonable alternatives for maintaining the project and that would keep the healthcare facility operational to serve community needs. In addition to any findings that may be provided in other guidance, the Commissioner shall base the determination on the findings listed below:

(1) The lender is entitled, after a default as defined in § 207.255, to assign the mortgage in exchange for the payment of insurance benefits;

(2) The relief resulting from partial payment, when considered with other resources available to the project, would be sufficient to restore the financial viability of the project;

(3) The project is or can (at reasonable cost) be made physically sound;

(4) The current or proposed operator of the facility is satisfactory to the Commissioner, as demonstrated by past experience in operating similar types of healthcare facilities and by state regulatory performance;

(5) The default under the insured mortgage was beyond the control of the borrower and/or operator, or in the case of a transfer of physical assets (TPA), the proposed borrower or operator, unless the Commissioner determines that any borrower/operator deficiencies giving rise to the default have clearly been addressed; and

(6) The project is serving as, or potentially could serve as, a needed nursing home, intermediate care facility, board and care home, or assisted living facility.

(c) Partial payment of a claim under this section shall be made only when:

(1) The property covered by the mortgage is free and clear of all liens other than the insured first mortgage and such other liens as the Commissioner may have approved;

(2) The lender has voluntarily agreed to accept a PPC under the mortgage insurance contract and to recast the remaining mortgage amount under terms and conditions prescribed by the Commissioner; and

(3) The borrower has agreed to repay to the Commissioner an amount equal to the partial payment, with the obligation secured by a second mortgage on the project containing terms and conditions prescribed by the Commissioner. The terms of the second mortgage will be determined on a case-by-case basis to ensure that the estimated project income will be sufficient to cover estimated operating expenses and debt service on the recast insured mortgage. The Commissioner may provide for postponed amortization of the second mortgage.

(d) Payment of insurance benefits under this section shall be in cash.

(e) A lender receiving a partial payment of claim, following the Commissioner's endorsement of the mortgage for full insurance under 24 CFR part 252, will pay HUD a fee in an amount set forth through Federal Register notice. HUD, in its discretion, may collect this fee or deduct the fee from any payment it makes in the claim process.

Dated: December 3, 2012

Carol J. Galante,
Acting Assistant Secretary for Housing –
Federal Housing Commissioner

[FR-5537-F-02]

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